

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

GUILLERMO MALDONADO

v.

C.A. No. 99-153L  
(CR. No. 97-043L)

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

Ronald R. Lagueux, United States District Judge.

This matter is before the court on the motion of petitioner, Guillermo Maldonado, (true name Miguel Angel Soto) (originally filed pro se) to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. An evidentiary hearing was conducted by the court on September 9, 1999, at which time petitioner was represented by counsel. At that time, the court took the matter under advisement and directed the parties to file written memoranda. Petitioner, through counsel, and the government have submitted their post-hearing memoranda and the motion is now in order for decision. For the reasons set forth below, petitioner's motion to vacate sentence is granted.

On August 7, 1997, Maldonado pleaded guilty to both counts of a two-count indictment. Count I charged that he knowingly and intentionally possessed with intent to distribute cocaine and Count II charged the same with respect to heroin in violation of 21 U.S.C. §§ 841 (a)(1), (b)(1)(A) and (b)(1)(B).

A sentencing hearing was conducted on March 30, 1998. At the hearing, evidence was presented on, inter alia, the issue of whether any portion of the cocaine at issue was "crack". Under the sentencing guidelines, a greater base offense level is assigned to "crack" related offenses than is applicable to offenses involving the same amount of cocaine powder or non-"crack" forms of cocaine base. Also at the hearing, evidence was taken on the issue of whether petitioner ever possessed the heroin involved.

Based upon the testimony and other evidence presented at the hearing, the court concluded that all of the cocaine in question was “crack” cocaine and that petitioner indeed possessed the heroin. The total amount of “crack” and heroin involved in the offenses to which petitioner pleaded guilty resulted in a base offense level of 34. Over Maldonado’s objection, the court applied a two-level increase in the offense level for obstruction of justice because he testified falsely at the hearing and had previously lied to probation about his identity and prior record. In addition, the court determined that petitioner was not entitled to any base offense level decrease for acceptance of responsibility. Thus, petitioner’s total offense level equaled 36.

Despite petitioner’s argument to the contrary, the court concluded that, because Maldonado committed the instant offenses while he was subject to an outstanding warrant, his criminal history category was properly determined as level II. On each of the two counts of the indictment, the court imposed a sentence of 210 months’ imprisonment, the minimum term specified by the sentencing guidelines. The sentences were to be served concurrently. In addition the court imposed concurrent five-year terms of supervised release and a total special assessment of \$200.00. As a condition of supervised release, the court directed that, upon completion of his term of imprisonment, petitioner be surrendered to immigration officials for deportation proceedings and, if ordered deported, remain outside the United States.

At the conclusion of the sentencing hearing, the court advised Maldonado of his right to appeal his sentence. Thereafter, a notice of appeal was filed on petitioner’s behalf by defense counsel, Edward F. St. Onge. St. Onge had become counsel of record for Maldonado on October 22, 1997, subsequent to the entry of the plea but prior to sentencing, and simultaneous to the court’s grant of original defense counsel’s motion to withdraw.

Although there is some dispute regarding the reasons underlying his failure to do so, it is uncontroverted that St. Onge did not undertake any further efforts in pursuit of petitioner's appeal. By order entered on July 15, 1998, the United States Court of Appeals for the First Circuit dismissed Maldonado's appeal for want of prosecution. Specifically, the Court of Appeals noted that Maldonado had failed to file any statement of issues, designation of the contents of the appendix, brief or appendix. Mandate was issued on August 6, 1998.

Thereafter, in March 1999, petitioner filed the instant § 2255 motion. In support of his motion, Maldonado contends that defense counsel rendered ineffective assistance on appeal. Specifically, petitioner alleges that St. Onge did not carry through with the appeal on his behalf or file a brief in conformance with Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

As a preliminary matter, it is clear from a review of the record in Cr. No. 97-43L that a timely notice of appeal was, in fact, filed on petitioner's behalf by St. Onge. Thus, the appropriate focus of the court's inquiry is on defense counsel's failure to pursue the appeal beyond the filing stage.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14 (1970)). Normally, a defendant alleging ineffective assistance of counsel must demonstrate both that counsel's conduct fell below an objective standard of reasonableness and that he was prejudiced by the attorney's dereliction. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. However, in certain situations, prejudice is presumed. For example, the "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." Id. at 692, 104 S.Ct. at 2067. Thus, when a § 2255 movant demonstrates that, through the dereliction of his attorney, he lost

his right to pursue a direct appeal from his conviction, he will not be required to prove the existence of a meritorious appellate issue as a prerequisite to obtaining post-conviction relief. Bonneau v. United States, 961 F.2d 17, 23 (1<sup>st</sup> Cir. 1992). In such circumstances, the original sentence will be vacated and the defendant will be resentenced, thus affording the defendant a new opportunity to pursue an appeal. Id.

St. Onge testified at the evidentiary hearing. He acknowledged that he filed a notice of appeal on petitioner's behalf and that he received a notice from the Court of Appeals regarding the due dates for filing of Maldonado's statement of issues, appellate brief and appendix. However, the attorney admitted that he failed to comply with that order.

St. Onge testified that he did not believe that there were any meritorious issues to pursue on appeal and that he so advised petitioner shortly after sentencing. St. Onge contends that he explained to Maldonado that, if, as counsel, he did file a brief, it would be an Anders brief, which would set forth counsel's belief that there were no non-frivolous grounds for an appeal. St. Onge testified that he did not want to file an Anders brief because he believed that to do so would have "finished [Maldonado] off". That is, St. Onge believed that his submission of an Anders brief would seriously impair any chance of petitioner successfully pursuing his appeal. Accordingly, the attorney recalled that he advised Maldonado to obtain another lawyer to prosecute the appeal. St. Onge testified that petitioner assured him that he had, in fact, already done so. Nonetheless, St. Onge acknowledged that he did not receive an entry of appearance from any other attorney on petitioner's behalf and that he never filed a motion to withdraw as Maldonado's appellate counsel.

The petitioner also testified at the evidentiary hearing and provided a somewhat different recollection of his post-sentencing discussions with St. Onge. Maldonado testified that St. Onge was

optimistic as to the probability of success on appeal. In addition, petitioner believed that the attorney was pursuing the appeal, although Maldonado and St. Onge did not discuss what specific issues would be raised on appeal. Maldonado denied that he had ever sought or obtained alternate counsel.

It is undisputed that, in early-April 1998, St. Onge was paid \$1,000.00 on petitioner's behalf. The "memo" portion of the check tendered to St. Onge contains the notation "appeal." However, the attorney testified that the purpose of the payment was to cover the appellate filing fee and to compensate him for services already performed in the criminal proceeding.

Although petitioner and St. Onge differ somewhat in their recollections of the circumstances surrounding St. Onge's failure to prosecute the appeal, it is clear that petitioner never expressly directed him to cease his pursuit of the appeal. Although St. Onge testified that, based upon his conversations with Maldonado, he understood that petitioner had obtained alternate counsel who would assume responsibility for prosecuting the appeal, he acknowledged that he was never contacted by any other attorney and never received any notification that another attorney had entered an appearance on Maldonado's behalf in the First Circuit. Although he testified that he believed that there were no meritorious issues for appeal, he never sought to withdraw as counsel. St. Onge remained counsel of record throughout the pendency of the appeal.

First Circuit Local Rule 12(b) provides in pertinent part:

**Withdrawal of Appearance.** No attorney who has entered an appearance in this court may withdraw without the consent of the court. An attorney who has represented a defendant in a criminal case in the district court will be responsible for representing the defendant on appeal, whether or not the attorney has entered an appearance in the Court of Appeals, until the attorney is relieved of such duty by the court.

First Circuit Local Rule 46.6 sets forth the procedures for seeking leave of court to withdraw as

counsel in criminal cases. Where the reason for the motion is the frivolousness of the appeal, Local Rule 46.6 directs that counsel follow the procedures outlined in Anders.

In spite of what may have been St. Onge's good intentions in electing not to do so, he failed to comply with the withdrawal procedures delineated in Anders and the First Circuit's Local Rules. Contrary to the requirements of Anders, St. Onge failed to notify the Court of Appeals that he believed the appeal to be frivolous and failed to request permission to withdraw as counsel. See Anders, 386 U.S. at 744, 87 S.Ct. at 1400. Anders also requires that the request "be accompanied by a brief referring to anything in the record that might arguably support the appeal." Id.

Instead, St. Onge, although remaining as counsel of record, took no further action in pursuit of the appeal. As a result of his attorney's inaction, Maldonado was completely deprived of the opportunity to obtain appellate review of his sentence. The appropriate remedy in such circumstances is to vacate the sentence previously imposed and to resentence the defendant, thus affording him another opportunity to seek direct review in the court of appeals.

Accordingly, for the above reasons, the motion of petitioner, Guillermo Maldonado, to vacate sentence, pursuant to 28 U.S.C. § 2255, is granted. The sentence imposed in Cr. No. 97-043L is hereby vacated. The clerk shall set the matter down for resentencing in due course.

IT IS SO ORDERED.

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Ronald R. Lagueux  
United States District Judge  
February , 2000